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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 45

SALVATORE PANICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

SALVATORE PANICO,

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—v.—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Salvatore Panico prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on September 14, 1962.

Citations to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed as an appendix to this petition, is reported in 308 F. 2d 125.

Jurisdiction

The judgment of the Court of Appeals was entered on September 14, 1962 (printed in the appendix to this petition). A timely petition for rehearing (filed September 26, 1962) was entertained by the Court of Appeals, and was denied by that Court on October 3, 1962. The petition for rehearing having requested rehearing by the Court of Appeals *in banc*, such petition for rehearing *in banc* was denied by order of October 10, 1962. By order dated October 29, 1962, Mr. Justice Harlan extended the time for filing a petition for a writ or certiorari in this case to and including December 2, 1962 (the latter date falls on a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Utilizing the summary procedures of Rule 42(a), F. R. Cr. P., the District Court convicted petitioner of criminal contempt of Court for his conduct during a lengthy criminal prosecution in which petitioner was one of numerous defendants. Petitioner was sentenced to fifteen months imprisonment for the alleged contempt. It was urged on behalf of petitioner that he could not have harbored the requisite criminally contemptuous intent because he was insane. The questions presented are:

1. Was it error to cite and to convict petitioner under the summary contempt procedure of Rule 42(a), F. R. Cr. P., instead of affording to him the protections of a proceeding under Rule 42(b) in which he could have had a trial (before

another Judge if he so desired) of the issue of his mental capacity to form the requisite criminal intent?

2. Even under the Rule 42(a) procedure, does the record herein require reversal of the conviction in view of the proofs as to petitioner's mental condition?

3. Do the relevant time sequences of the allegedly contemptuous acts, the obtaining of the proofs of petitioner's mental condition, and the subsequent sentencing for contempt (at the conclusion of the main criminal trial itself), plus the proofs pointing to petitioner's progressively worsening mental condition (which became one of adjudicatedly declared schizophrenia soon after the sentencing), give rise to the distinct aggrievement that the sentencing of petitioner for contempt was the sentencing of a person who then and there, at the time of such sentencing, was insane?

4. Was petitioner denied due process of law by being cited, convicted and sentenced for criminal contempt in the circumstances depicted in our preceding questions?

Constitutional Provisions, Statues and Rules Involved

The case involves the Fifth Amendment of the Constitution of the United States (due process of law); 18 U.S.C. §401; and Rules 42(a) and 42(b) of the Federal Rules of Criminal Procedure. The statute and Rules are printed as an appendix to this petition.

Statement of the Case

1. Preliminary Statement: Petitioner's Request to Reserve Opportunity to Move for Leave to File Amended or Substituted Petition Owing to Present Unavailability of Certain Collateral Record Items.

As appears in more detail in our "Statement of the Proceedings," *infra*, the judgment as to which this petition for certiorari seeks review—the judgment of the Court of Appeals for the Second Circuit affirming petitioner's conviction for contempt—rests upon a formal appellate record of such a nature that, unless certain collateral items are considered along with it, meaningful judicial review thereof is not possible. The papers which have been certified to this Court by the Clerk of the Court of Appeals as composing the original record in that Court with respect to the instant contempt proceedings happen to be only skeletal in coverage. This skeletal certified record does not include any printed appendix of any of the proceedings in the District Court relating to the contempt, inasmuch as the usual printed appendix on appeal was not filed by any of the parties, the appeal in the Court below having been handled on a highly expedited basis because the companion contempt sentences imposed by the District Court on several of the instant petitioner's co-defendants in the criminal prosecution in which these contempts arose were sentences of short duration which were already being served while the appeal below was pending. A further unusual feature is that the trial minutes of the criminal prosecution in which the alleged contempts arose were never made a formal part of the contempt-appeal record in the Court of Appeals, although, as will appear, those minutes and relevant exhibits must at some point have been available to the Court of Appeals, at least in connection with the appeal of

the instant petitioner Salvatore Panico if not in the appeals of his co-defendants in the contempt proceedings. The minutes of the criminal trial in which the alleged contempts arose—it was a narcotics prosecution—did not formally become part of the record in the contempt appeals in the Court below for the reason (seemingly) that the criminal proceedings as such (the narcotics case) were still pending in the District Court at the time when the contempt appeals were instituted in the Court of Appeals. In any event, those narcotics trial minutes and exhibits, we are advised by the Clerk of the Court of Appeals, did not become a formal part of the record in the contempt appeals in the latter Court, and the certified papers which have been supplied to us by the Clerk of the Court of Appeals for filing in this Court in connection with the instant petition indicate the same thing. In fact, even the District Court's citation or certificate of contempt had to be requested by us from the Clerk of the Court of Appeals to be certified to this Court as a distinct item because it was not a formal part of the record in the contempt appeal below (having been made available to the Court of Appeals as an exhibit annexed to the Government's brief in the contempt appeals).

The question will naturally occur to this Court as to why we have not nevertheless, at this later time, seen to it that our filing of the relevant record items in connection with the instant petition for certiorari should include the trial record in the narcotics case as a whole. We tried to do just this, but, as of the time of the filing of this petition for certiorari, it has proved to be impossible for the following reasons: Appeals from the narcotics trial convictions as such are presently pending in the Court below on behalf

of the numerous defendants in that trial (including the instant petitioner). The trial record of that narcotics case, consisting of approximately 8,000 pages of testimony and several hundred exhibits (plus many hundreds of pages of other proceedings) is being held in the office of the Clerk of the Court below to take care of the necessities of the numerous attorneys of the appellants in the narcotics case. Without burdening this Court as to the details of the administrative difficulties, suffice it to say that, in discussions which we have had with the Clerk of the Court of Appeals, it was settled upon as the advisable course that we should file in this Court, in connection with the instant petition for certiorari, the certified record papers which we are herewith filing (see description *infra*), and that we should explain to this Court the condition of affairs in regard to the record and exhibits in the narcotics trial (as we are herein doing). As regards those exhibits, furthermore, it is to be noted that many of them have been ordered sealed by the District Court, and that several of those exhibits which are most important for the consideration of the instant petition for certiorari (including both sealed and unsealed exhibits) are also important for the pending appeals in the Court below from the narcotics case convictions of not only the instant petitioner but also all of the other appellants, inasmuch as the mentally questionable conduct of the instant petitioner during the narcotics trial is believed to present serious issues of fair trial in the narcotics case appeals of the co-defendants.

The above described difficulties were recited to some extent in the application which we recently presented to Mr. Justice Harlan for an extension of time within which to file this petition for certiorari. Those difficulties con-

tinue unresolved at this time, and since we have already received one extension of thirty days within which to file this petition we have been obliged to proceed with such filing at this time, relying on the fact above mentioned that the record which we are filing herein on the strength of the certification made by the Clerk of the Court of Appeals is the formally complete record in the Court below.

The Court below has ordered that the argument of the appeals in the narcotics case shall be had during the week of January 28, 1963. Petitioner intends to proceed with the filing in this Court of the record of the narcotics trial (including the relevant medical exhibits) as soon as such become available, or, of course, at any other time which this Court may direct. After such further filing shall have occurred, or if it should turn out that this certiorari proceeding is to proceed to a final disposition without awaiting such further filing, petitioner may wish to request leave of this Court to file an amended or substituted petition for certiorari or a supplement to the instant petition, and petitioner hereby respectfully requests the right to reserve opportunity to do so.

In addition to filing herewith the record of petitioner's contempt appeal in the Court below which has been certified by the Clerk of that Court, and the previously mentioned citation or certificate of contempt filed by the District Court, we are also filing herewith the following certified record items: the certified record of the proceedings in the Court below in Docket No. 27613, which was an original proceeding for mandamus brought by the instant petitioner against United States District Judge Lloyd F. MacMahon (the docket number of the proceedings in the Court below in the

contempt appeal as such is No. 27667); and a certified exhibit consisting of typewritten excerpts from the minutes of the narcotics trial, which excerpts were originally filed in the Court below in support of petitioner's above mentioned application for mandamus, and were subsequently considered by the Court below also in disposing of petitioner's appeal from the contempt conviction which is herein sought to be reviewed. Also, in the appendix to this petition (pp. 15a *et seq., infra*), we print copies of correspondence relating to petitioner's mental condition which were submitted to and considered by the Court below in the instant contempt appeal. And, to recapitulate, the collateral record items which we are unable as aforesaid to file at this time consist of the complete record of the narcotics trial (bearing the file number "60 Cr. 436" in the District Court, and Docket No. 27733 in the appeal from the narcotics convictions in the Court below), as well as the following numbered "Court Exhibits" in the narcotics trial which are relevant to petitioner's mental condition, namely, numbers 139, 140, 141, 142, 146 (sealed), 147 (sealed), 149, 150, 150A, 150B, 187, 205.

2. The Proceedings Below.

(Because we anticipate, as above stated, that this petition may be amended, substituted or supplemented when the complete record materials of the narcotics trial (in which the instant alleged contempts arose) become available for filing in this Court, our following statement of the facts and proceedings below does not aim at presenting all of the relevant facts or all of the relevant citations to the record.)

The judgment sought to be reviewed is that of the Court of Appeals for the Second Circuit, affirming, by a divided Court (Circuit Judge Friendly, dissenting), an order of the District Court for the Southern District of New York (Lloyd F. MacMahon, District Judge), which sentenced the instant petitioner, a defendant in a narcotics prosecution, for contempt of court. The sentence was fifteen months, to be served at the expiration of certain other sentences.

The allegedly contemptuous conduct of the petitioner which resulted in his conviction for contempt consisted of outbursts in the courtroom during the trial of the narcotics case before Judge MacMahon. In the Court of Appeals it was urged on behalf of this petitioner, as being the dispositive issue, that petitioner was insane at the time of those outbursts, as well as at the time of his sentencing for contempt. Judge MacMahon had concluded, in his certificate pursuant to the Rule 42(a) procedure used by him in this contempt proceeding, that petitioner was not insane. The majority and minority opinions in the Court of Appeals disagreed as to the propriety of the use of the summary procedures of Rule 42(a), Judge Friendly in dissent saying that the procedures of Rule 42(b), which requires notice and hearing (and the participation of another Judge at the option of the defendant), should have been used in this case. The gravity of the factual-medical issues which were resolved by Judge MacMahon under the summary procedures of Rule 42(a) is evidenced by the differing ways in which the majority and minority opinions, respectively, of the Court of Appeals treated those questions.

Petitioner's outbursts in the narcotics trial which gave rise to the contempt proceedings were of an extreme nature.

In the first of the more serious outbursts, on May 23, 1962, petitioner physically charged into the jury box, screaming incoherencies and obscenities (Tr. 5638 et seq.).* After additional outbursts on the two succeeding days (May 24 and 25, 1962), the Trial Court conducted a hearing as to petitioner's mental competency to continue to stand trial pursuant to 18 U.S.C. §4244. The testimony of the psychiatrists at that hearing put in at least very serious doubt petitioner's capacity to continue to stand trial as a sane person (see details, *infra*, and the summary of the testimony in Judge Friendly's dissenting opinion in the Court below, appendix, *infra*). Nevertheless Judge MacMahon concluded that petitioner was able to stand trial. Thereafter petitioner, under order of Judge MacMahon was gagged, shackled and bound to his chair while present in the courtroom during the trial. One of the psychiatrists who had testified at the hearing on May 29, 1962, Dr. Theodore S. Weiss, senior psychiatrist of the Prison Ward, Bellevue, Department of Hospitals, had stated (see details, *infra*) that the petitioner's condition was one which would probably worsen unless the pressures upon him were eased. Instead, those pressures were intensified by the gagging, and shackling. Under these pressures, it then came about that on June 7 and June 8, 1962, the petitioner made attempts at suicide. Early in the morning hours of June 7, the petitioner hanged himself in his cell while his cell mates were asleep; he was cut down before the suicide could be effected. On the next night, in the early morning hours (June 8), the petitioner cut his wrists and arms in four-

* "Tr." refers to the trial minutes in the narcotics trial (not yet available for filing herein). See also the previously mentioned contempt citation or certificate, and the typewritten excerpts, both of which are filed with this petition.

teen places with a razor, lost more than 200 centimeters of blood and required 50 sutures. After these two suicide attempts, and upon further advice from Dr. Weiss, and upon petitioner's attorneys finding that they could not communicate with petitioner's mind at all, the attorneys for petitioner renewed their application before Judge MacMahon for a hearing on the petitioner's mental competency to continue to stand trial. This latter application on behalf of petitioner, made on June 13, 1962, was summarily denied by Judge MacMahon without conducting the preliminary psychiatric examination mentioned in 18 U.S.C. §4244. Thereupon petitioner's attorneys applied to the Court of Appeals for a writ of mandamus to compel Judge MacMahon to conduct such a renewed preliminary psychiatric examination, and the Court of Appeals granted such writ of mandamus (see certified record of mandamus proceeding filed herewith).

Before reciting the developments which followed that mandamus, we pause to note in more detail the circumstances of petitioner's abnormal conduct during the narcotics trial, and the Trial Judge's attitude concerning it.

The Trial Court had persistently refused to appoint a qualified psychiatrist to examine petitioner (Tr. 5679, 5723, 5873, 5893). The Court's reluctance to appoint a qualified psychiatrist to examine petitioner in accordance with 18 U.S.C. Sec. 4244 was shown, *inter alia*, by the comments made by that Court to the effect "that appellant's actions were taken right from the Aviles case, as though a script were written in that case" (Tr. 5661). The Court repeated his remarks on the Aviles case (Tr. 5873, Ex. pgs. 13-14). On the 25th of May, after petitioner had made an inculpatory outburst concerning a co-defendant, the Court in the pres-

ence of the jury (after denying a motion for a mistrial) said: "The Court: Your motion for a mistrial is denied, Mr. Krieger. Mr. Krieger, it is obviously a putup job" (Tr. 5889). Upon the request of petitioner's counsel that a doctor be called, the Court stated, "If the doctor is here, he will examine him. There is nothing wrong with him" (Tr. 5893).

The Court had finally (May 25) appointed a qualified psychiatrist, Dr. Arnett, to examine petitioner. This examination took place within a few hours after the Court had stated that petitioner's actions were a put-up job and that there was nothing wrong with him. Dr. Arnett's examination disclosed that petitioner had developed a paranoid state with psychosis and that he was not capable of undergoing a trial at that point (Tr. 5906). Dr. Arnett further stated that petitioner would need a rest of one to two weeks (Tr. 5913); that as to the rational moments when petitioner could understand what was going on about him and consult with counsel, it was Doctor Arnett's opinion that petitioner would lose control of himself at least 75% of the time if not 100%; and that his symptoms were not consistent with faking (Tr. 5914-5917).

Even though Dr. Arnett advised prompt treatment, the Court, still preoccupied with the "Aviles" case, asked Dr. Arnett if his opinion would be altered if he were told that the petitioner had entered the jury box while the jury was there; had made accusatory statements about other defendants and had done the same thing that morning from the chair; would his (Dr. Arnett's) view change if he were told that it had been done before by others in other cases as a basis to provoke a mistrial? Dr. Arnett answered the Court's query by stating it would not change his opinion,

particularly since his examination automatically in legal cases like this is definitely oriented to look for signs of malingering (Tr. 5918).

The Court, instead of committing petitioner to Bellevue Hospital for observation and treatment, had him re-examined. On May 29th, the Government's Doctor, George H. Hyslop, testified that he had examined petitioner by asking questions and receiving answers; that in his opinion petitioner could confer with counsel in aid of his defense (Tr. 5968). However, Dr. Hyslop admitted that he did not know about petitioner's outbursts when he examined him. (Tr. 5975, 5977, 5983-5984). Dr. Hyslop also stated that petitioner was not malingering (Tr. 5968).

Dr. Arnett then was called again (May 29) by the Court and he stated that he had examined petitioner for one hour; that in his opinion petitioner was able to discuss the facts with his lawyer (Tr. 5998). On cross-examination, Dr. Arnett admitted that when he saw petitioner on May 25, he was suffering from a paranoic state with psychosis (Tr. 6002).

The defense then (May 29) called Dr. Theodore S. Weiss, the senior psychiatrist at Bellevue Hospital since 1940. Dr. Weiss concluded that appellant was suffering from a psychosis of the paranoid type, that the paranoid ideas were fixed, but reactive in character, meaning that they were most probably a reaction to the tensions of the courtroom procedures and the situation he found himself in. Appellant had definite ideas of reference, persecutory ideas and intermittent auditory hallucinations; his affect was tense, agitated at times and depressed and probably suicidal. On June 14, 1962 in a letter addressed to petitioner's counsel,

Mr. Aronne, Dr. Weiss stated, "In view of his (petitioner's) conduct and the increasing tension he has been under in the courtroom since my examination, I feel definitely that the psychosis is severe and deepening in character. In my opinion, he cannot adequately confer with counsel for his own defense." (Tr. 6021-6025; see letter of Dr. Weiss attached to the moving papers for a mandamus and printed in the Appendix, *infra*, p. 15a.)

As earlier mentioned there occurred on June 7 and June 8 the suicide attempts of the petitioner, and the subsequent mandamus proceedings. In obedience to the mandamus, the Trial Court had petitioner reexamined by Dr. Hyslop, on June 19. This "examination" occurred in the following manner: At 9:20 P.M., petitioner was taken from his cell in the courthouse to be examined by Dr. Hyslop in another part of the courthouse. He was returned to his cell at 9:55 P.M. At most this examination by Dr. Hyslop consumed one-half hour. Petitioner complained of a severe headache and the examination was adjourned to the following day during lunch hour. This examination was not had because Dr. Hyslop was in fear of his safety. The Trial Court had prepared several questions for Dr. Hyslop to answer. Three of these questions were: whether petitioner could confer with counsel for the preparation of his defense; whether he knew the nature and quality of his acts; whether he could distinguish between right and wrong. To the first question Dr. Hyslop stated he could not answer. As to the other two questions he could not state. Nevertheless, one day later, without the benefit of any additional examinations, Dr. Hyslop submitted to the Court a more detailed report and completely changed the answers he had previously given. (See sealed records impounded by the Trial Court.)

Although the Trial Court had stated on several occasions that he would give the petitioner a sanity hearing at the conclusion of the trial, he did not do so (Tr. 5723, 5873, 7430).

The last of the courtroom outbursts by the petitioner in the trial before Judge MacMahon which formed the basis of the adjudication of contempt occurred on June 15, 1962. The judgment and sentence of contempt occurred on June 26, 1962. Under date of August 28, 1962, while the appeal below was pending, the undersigned attorney for the petitioner wrote to the Clerk of the Court of Appeals advising that on August 22, 1962, petitioner had been committed to the Dannemora State Hospital, Dannemora, New York, by order of the County Judge of Westchester County, as being schizophrenic, such having been found upon examination by two State appointed psychiatrists who had confirmed this diagnosis as originally made by the psychiatrist at Sing Sing Prison on July 12, 1962. (See copies of correspondence printed in the Appendix, *infra*, pp. 17a-21a.) The majority opinion of the Court of Appeals does not refer to these facts concerning petitioner's post-sentence diagnosis and judicial commitment as a schizophrenic (Appendix, *infra*). The dissenting opinion of Judge Friendly does refer to these facts (*ibid.*).

(Notwithstanding the previously mentioned incomplete character of the record materials presently available for filing herein on the facts relating to petitioner's mental condition, this Court may obtain a fairly meaningful picture of the situation from the herewith filed certified typewritten excerpts which were originally submitted as an Exhibit in the mandamus proceeding in the Court below, and, as already suggested, from Circuit Judge Friendly's

dissenting opinion (Appendix, *infra*). We recall to the Court that there is also filed herewith a certified copy of the complete text of Judge MacMahon's citation or certificate of contempt.)

Reasons for Granting the Writ

Since we anticipate that an amended or substituted petition, in place of the instant one, may be filed at a future date (subject to leave of this Court), and since the dissenting opinion of Circuit Judge Friendly in the Court below (Appendix, *infra*, pp. 6a *et seq.*) contains an extended statement of the reasons why the opinion and judgment below are erroneous—a statement upon which it would be difficult for us to improve—we shall limit ourselves, in the instant petition, to a very brief statement of the reasons for granting the writ.

1. The important question of the fair administration of federal criminal justice which this record presents appears to be *de novo* and to call, therefore, for a decision by this Court to guide future federal criminal trials. That important question is, whether the summary procedures of Rule 42(a) of the Federal Rules of Criminal Procedure are intrinsically applicable at all, either on the face of the language of the Rule itself or in terms of constitutional due process, where, as in this case, the question of the scienter of a person charged with criminal contempt committed *in facie curiae* becomes subject to be summarily determined by the trial judge even though the claim is made, indicatively supported by the record, that the person ac-

cused of contemptuous conduct was insane or otherwise mentally incapable of forming and acting upon such requisite criminal scienter or intent. Cf. *Cooke* v. *United States*, 267 U. S. 517. As may be surmised from the fact that neither the majority nor the dissenting opinion below cited any precedent directly touching upon this question, the question would appear to be (as we have suggested) a *de novo* one. Moreover, the severity of the contempt sentence imposed upon the instant petitioner (15 months) favors all the more strongly that this Court should interpose its corrective powers in the interests of justice.

2. Even if the summary procedure of Rule 42(a) was not erroneously invoked in this case, it is submitted that upon the record facts relating to petitioner's mental condition, the judgment of conviction for contempt was erroneous and should be reversed by this Court in the interests of justice. This feature of the case will be more suitably presented for this Court's determination after the presently unavailable materials deriving from the record of the narcotics trial (especially the medical exhibits) shall have been filed with the Court, as explained *supra*.

3. Most especially, this Court's powers in monitoring the proper administration of federal criminal justice should be exercised in this case to correct the injustice that has become manifest by reason of the events post-dating the conviction and sentencing of the petitioner for criminal contempt. We refer to the facts recited in our "Statement", *supra*, to the effect that petitioner, shortly after that conviction and sentence, was adjudicated and commited as a schizophrenic. As noted in the dissenting opinion of Circuit Judge Friendly in the court below (appendix *infra*,

p. 8a), these post-conviction facts were before the Court below, but they apparently did not avail to bring about the corrective which we are respectfully praying this Court to apply.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted, and that opportunity be reserved to petitioner to file an amended, substituted or supplemental petition as previously herein requested.

Respectfully submitted,

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APPENDIX A—Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 400—September Term, 1961.

(Argued July 17, 1962 Decided September 14, 1962.)

Docket No. 27667

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE PANICO,

Defendant-Appellant.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, sentencing appellant, a defendant in a narcotics prosecution, for contempt of court.

Affirmed.

Appendix A

JONATHAN L. ROSNER, Assistant United States Attorney for the Southern District of New York (Robert M. Morgenthau, U. S. Attorney and Sheldon H. Elsen and Arnold N. Enker, Asst. U. S. Attorneys, So. Dist. of New York, on the brief), *for appellee.*

JEROME LEWIS, New York, New York, *for defendant-appellant.*

SMITH, *Circuit Judge*:

This is an appeal from a judgment of contempt entered July 5, 1962 in the United States District Court for the Southern District of New York, by Judge MacMahon, upon a certificate filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., sentencing the defendant to fifteen months to be served at the expiration of a sentence now being served in the State of New York and a sentence imposed by the State of Florida.

The actions of defendant which prompted the use of the contempt power occurred during a twelve week trial, upon an indictment charging twenty-nine defendants with violations of the federal narcotics laws. The first trial before Judge Levet ended in a mistrial when the foreman of the jury sustained injuries on the eve of summation at which time no alternate jurors remained. At the conclusion of said trial, and prior to the declaration of a mistrial, Judge Levet adjudged Galante and Mirra in contempt of court. *United States* v. *Galante,* 298 F. 2d 72 (2 Cir. 1962). An insight into the succession of delays and attempts to forestall a trial may best be gained by referring to some of the

related cases previously decided by this court. *United States* v. *Bentvena*, 288 F. 2d 442 (1961); *United States* v. *Galante, supra; United States* v. *DiPietro*, 302 F. 2d 612 (1962); *United States* v. *Bentvena*, decided July 20, 1962.

Appellant concedes, as indeed he must, that the conduct complained of was contemptuous on its face but argues that appellant "was too mentally ill to formulate the intent to be contumacious." In effect he urges that the actions were not intentional. Appellant also argues that he was not sane at the time of sentence and so the sentence is unlawful as an insane person may not be sentenced to imprisonment. With respect to defendant's claims of insanity the trial court concluded the following, as set out in the certificate:

> The court had him examined by a psychiatrist, took time out of this trial for three days, conducted psychiatric hearings, found him able, capable of understanding the trial, of standing trial. Despite that, he persisted in a course of conduct, faked a hanging attempt, attempted to slash his wrists but made absolutely sure that it did not kill him. There are seven cuts on each arm placed about an inch apart, a deliberate effort to make certain it wasn't effective.
>
> With that plus your repeated requests and a mandamus of the United States Court of Appeals, the Court directed a further examination of Panico. A psychiatrist examined him and found him sane in all respects. The Court takes notice of the fact that he is now an inmate at Sing Sing, serving two and a half years to five years, that he faces on top of that 18 months for

a conviction in Florida, and that there are charges against him pending in Bronx County as well as the charge for which he has just stood trial in this Court. Obviously it was to his advantage to break up this trial and to do everything in his power to inject prejudice in the record. The contempt sentence, however heavy, would be disproportionate to any sentence he might face here were he found guilty. His acts were wilful, deliberate, calculated to impede, obstruct, delay and abort this trial.

The Court takes judicial notice of the entire record before Judge Levet, of his behavior there, his good behavior there. The Court takes judicial notice of his behavior here prior to the incident of his jumping in the jury box and of the many conferences and sessions the Court had with him, with Mr. Todaro and with his other counsel, with you, Mr. Aronne, in attempts to arrange substitution for times when you couldn't be here. There is nothing insane about this man whatever. The Court so found it at the time. I so find it now.

Although the expert witnesses testified that Pancio was not malingering they were not present at the time of the incidents which prompted the summary conviction for contempt. Moreover, it is not at all clear that they did not mean only that he was not faking when he was examined by them. In any event, the court is not obliged to accept the conclusions of the experts. We do not think that the conclusion of Judge MacMahon with respect to the deliberate and calculated nature of defendant's acts constitutes re-

versible error. *United States* v. *Galante, supra* at p. 75 and cases cited therein.

Perhaps more serious than the correctness of the determination with respect to defendant's calculated intentions is the propriety of making such a determination in a 42(a) proceeding when a substantial question has been raised which requires expert testimony. On the one hand is the need for the court to mete out swift punishment in order to preserve the integrity of the judicial system. The instant case is eloquent testimony as to the need to preserve order in the courtroom lest defendants be convicted unjustly and absent the safeguards of an orderly and impartial trial. Justice can be reached only in an atmosphere of order and dignity. There can be little doubt that the effectiveness of punishment as a deterrent is related not only to the quality of the possible punishment but to the certainty and promptness as well. Were we to require resort to the more lengthy procedures of 42(b) whenever the defendant raises a serious question of intention or "mens rea" we fear this would seriously undercut the power of the courts to punish for contempt. On the other hand the very nature of the power to punsh for contempt requires that the power be scrupulously circumscribed, *Brown* v. *United States,* 359 U. S. 41, 52 (1959), and 42(a) makes no provision for the taking of any testimony. But see *United States* v. *Galante, supra* at 77 (Friendly, *C.J.,* dissenting). Because testimony had been taken concerning appellant's sanity during the course of the trial, we do not reach the question of whether such testimony may be taken in connection with a 42(a) proceeding since the Judge is permitted to consider all things which took place during

the proceedings in connection with which the contempt arises. Particularly the defendant's intention inasmuch as the defendant's subjective state of mind is the primary focus of the inquiry, for contempt is, after all, an "intentional act committed in defiance of the authority and dignity of the court." 61 Col. Law Rev. 727 (1961).

If the issue before the court is considered to be the propriety of the trial court's deciding, in a 42(a) proceeding, a question of fact which by its very nature does not lend itself to determination merely by consideration of factors which impress themselves directly upon the sensory perceptions of the presiding judge the answer is the same. The question in the instant case did not relate to conduct which transpired beyond the presence of the court as in *United States* v. *Sacher*, 182 F. 2d 416 (2 Cir. 1950), cert. denied 341 U. S. 952 (1951). On the contrary, the inquiry was concerned with the subjective character of actions which did take place in the presence of the court.

The judgment is affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

My inability to join in affirming Salvatore Panico's sentence for contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure will not, I hope, be attributed to lack of appreciation of the problems experienced by the district judges in the trial and retrial of this difficult criminal case, to excessive naivete, or to failure to understand that government cannot permit "The interests of society in the preservation of courtroom control * * * to be frustrated through unchecked impropriе-

ties," *Sacher* v. *United States*, 343 U. S. 1, 8 (1952), on the part of criminal defendants. The issue on which I am forced to part company with my brothers is a much narrower one—whether this vital interest has here been vindicated in the manner required by Rule 42 of Criminal Procedure in its effort to reconcile the need of maintaining order in the courtroom with that of preserving fundamental individual rights.

Conceivably Congress could have deemed the interest in protecting the order and dignity of the courts to be so important as to authorize judges to punish certain acts even though the actor was ignorant of the character and quality of what he had done. No one asserts that Congress has done this. The conduct for which Salvatore Panico has been punished—quite justifiably if he knew what he was doing—is described in the Federal catalogue of crimes, 18 U. S. C. §301, and our criminal law normally "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong," Pound, Introduction to Sayre, Cases on Criminal Law (1927), quoted in *Morissette* v. *United States*, 342 U. S. 246, 250, fn. 4 (1952).

In the usual case there is no issue whether an alleged contemnor was capable of making the choice that he did —on this very appeal there was none as to the five defendants whose conviction we unanimously affirmed, *United States* v. *Bentvena*, decided July 20, 1962. As to Salvatore Panico there was. When I state there was such an issue, I would not be understood as saying that, in this exceptional area the mere making of a claim of lack of a "vicious will," 4 Bl. Comm. 21, suffices to create an issue on that

score as it normally does in a criminal case; F. R. Crim. Proc. 42(a) can well be construed as authorizing the judge, by analogy to F. R. Civ. Proc. 56(c), to disregard a claim of this sort that does not create a "genuine issue." Yet my brothers do not and, I think, could not say that, even with this qualification, no issue was created here, at least as to appellant's capacity to "choose" to invade the jury box and address the jurors on May 23 and to perform the incidents on the two following days, which must have been an important basis for the long sentence of 15 months' imprisonment. Dr. Arnett, a psychiatrist appointed by the Court, testified on May 25 that Salvatore had "developed a paranoid state with psychosis"; Dr. Hyslop, later appointed, admitted that the May 23 incident "could have been a hysterical display"; and Dr. Weiss, called by appellant, thought that Salvatore did not fully comprehend the courtroom proceedings. Despite all this it may well be that, as my brothers say, we could not properly upset the judge's conclusion, based on other testimony of the doctors and his own observation, that "There is nothing insane about this man whatever," and this despite the fact, communicated to us by counsel after the argument, that the psychiatrist at Sing Sing Prison and two others have now diagnosed Salvatore as schizophrenic—if the judge had power to come to any conclusion for the purpose here relevant. I think he did not.

The summary procedure authorized by F. R. Crim. Proc. 42(a) rests on the basis, as its words clearly imply, that "There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense," *Cooke* v. *United States,* 267 U. S. 517, 534 (1925). Although

Appendix A

Judge MacMahon "saw or heard" Salvatore's physical acts, he had not and could not have seen "the conduct constituting the contempt," when an essential element of that conduct was a "vicious will" and a substantial issue had been raised as to Salvatore's capacity to possess one.

Moreover, the judge's certificate itself demonstrates how far he depended on things he neither saw nor heard. He places emphasis, as my brothers seem to do, on the testimony of the psychiatrists concerning Salvatore's ability to stand trial; the very fact that he found it necessary to rely on such evidence seems to show his belief that something beyond what he saw or heard appellant do was essential to conviction here.[1] The judge also relied on what he considered the faked character of appellant's suicide attempts, acts which Judge MacMahon neither saw nor heard and which were not committed in his presence. True, he saw the cuts on appellant's arms, but these were only circumstantial evidence as to the character of an act

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[1] Although I would reach the same conclusion if the facts were otherwise, it should be pointed out that the testimony of the psychiatrists was directed to an issue wholly different from that relevant to appellant's guilt of contempt. The testimony of Dr. Hyslop on May 29, and of Dr. Arnett on his second appearance, also on May 29, that Salvatore was then able to understand the nature of the charges against him (although Dr. Arnett had not thought him so when testifying on May 25), does not negate a conclusion that the paranoid state which Dr. Arnett identified on May 25 may have caused the outbursts antedating May 29 or even the ones postdating it. Dr. Arnett conceded, in his May 29 testimony, that psychotic episodes might recur. Moreover, as is well known, in paranoia, "Falsification of reality is restricted to misinterpreting events; what happens is correctly perceived, but peculiar inferences are drawn from it. Except for the delusional system, the patient is perfectly oriented and perfectly normal in his conduct. The personality does not become disorganized, and interest in the environment is substantially preserved," White, The Abnormal Personality (1948), 524.

outside his presence, and I can find no satisfying distinction between his use of such evidence to support a conclusion as to a plan formulated by appellant with respect to action taken outside the court and the trial judge's use of conduct inside the courtroom as an evidentiary basis for inferring an agreement made outside it, which a majority of this Court, in *United States* v. *Sacher*, 182 F. 2d 416, 455, 464 (2 Cir. 1950), held an impermissible case for proceeding under F. R. Crim. Proc. 42(a).[2] Since the certificate thus rested in part on findings not permitted to be made pursuant to Rule 42(a), we would be obliged at least to remand on this score alone. However, for reasons previously stated, I am convinced that no valid conviction under Rule 42(a) can be made in this case.

Perhaps I should emphasize that, as in *Offutt* v. *United States*, 348 U. S. 11 (1954), the consequence of the view taken in this opinion is the not very calamitous one that appellant shall be prosecuted, not under Rule 42(a), but under Rule 42(b), which requires notice, hearing and in this case, unless he consents, the participation of another judge. On the facts here, where there is indeed much to suggest a deliberate attempt to thwart a verdict and consequent likelihood that a trial under Rule 42(b) will yield no different result, reversal to that end may seem a useless formalism, especially when, if we should affirm appellant's sentence on the narcotics charge on which he was tried and convicted, the 15 months' sentence for contempt, sandwiched between his existing New York and Florida sen-

[2] The record also contains other evidence as to appellant's suicide attempts; it is hard to believe the judge performed the feat of putting this out of his mind and relying only on what he saw and heard.

tences and his new Federal sentence, will have a minimal practical importance. But the protection here refused this not too attractive appellant may be of vital consequence to a worthier one on another day; procedural safeguards in the administration of criminal justice do not exist for the sole benefit of nice people.

I would reverse for appropriate action under Rule 42(b).[3]

[3] I have not dealt with a possible contention that Salvatore Panico offered nothing to show that he was under a paranoid psychosis on April 2 when, the Court having assigned counsel because the lawyer of Salvatore's choice was engaged in a New York criminal trial, Salvatore said, in the course of the impanelling of a jury, "Do these people know I don't have a lawyer? What is this, Russia? There is nobody representing me here." The sentences imposed by the judge on other defendants for incidents of a character similar to this make it plain that he would not have sentenced Salvatore to 15 months' imprisonment but for the much more serious incidents of May 23, 24 and 25. Although a remand could permit a sentence under Rule 42(a) limited to the April 2 incident, it would seem wiser that all the specifications be considered together under the Rule 42(b) procedure.

APPENDIX B—Judgment Appealed From

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of September, nineteen hundred and sixty-two.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM BENTVENA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment as to Salvatore Panico of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C—Statute and Rules

Title 18, United States Code.

Section 401—Power of Court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Criminal Procedure

Rule 42—Criminal Contempt.

(a) Summary Disposition: A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing: A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time for the preparation of the defense, and shall state the

essential facts constituting the criminal contempt charged and described as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX D—Correspondence Re Petitioner's Mental Condition

THEODORE S. WEISS, M.D.
25 FIFTH AVENUE
NEW YORK 3, N. Y.

GRAMERCY 7-8255

June 14, 1962

Mr. Albert C. Aronne
Counselor At Law
186 Joralemon Street
Brooklyn 1, New York

Dear Mr. Aronne:

This is to certify that I examined Salvatore Panico on May 29, 1962. After a long interview and psychiatric examination, I came to the following conclusion, namely, that he was suffering from a Psychosis of the Paranoid Type, that the paranoid ideas were fixed, but reactive in character, meaning that they were most probably a reaction to the tensions of the courtroom procedures and the situation he found himself in. He had definite ideas of reference, persecutory ideas, and intermittent auditory hallucinations. His affect was tense, agitated at times, and depressed, and probably suicidal.

After my examination, I testified the same day in Federal Court, Southern District of New York. My examination of this prisoner was read in large part at the sanity hearing and I gave the diagnosis in the courtroom as stated

above. Subsequently, I was informed by you that he was held in restraints by various restraining agents while in the courtroom. On June 7 and June 8, 1962, he made two apparently serious suicidal attempts while held in the Federal Detention on West Street, in Manhattan. In the first attempt, on the 7th, he had to be cut down in an attempt to hang himself; the next day, on the 8th, he slashed his arm which necessitated, I understand, about 50 sutures.

In view of his conduct and the increasing tension he has been under in the courtroom since my examination, I feel definitely that the psychosis is severe and deepening in character. In my opinion, he cannot adequately confer with counsel for his own defense.

Very truly yours,

/s/ Theodore S. Weiss, M.D.
Theodore S. Weiss, M.D.

w/f
Qualified Psychiatrist
New York City

Appendix D—Correspondence Re Petitioner's Mental Condition

JEROME LEWIS
ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, 1, N. Y.

TRIANGLE 5-1882

July 20, 1962

Hon. Daniel C. Fusaro
United States Court of Appeals
Foley Square, New York

Re: U.S.A. v. Bentevena, et al.

Dear Mr. Fusaro:

I represent Salvatore Panico, one of the appellants in the above appeal.

On July 18th, I visited Salvatore Panico at Sing Sing Prison and learned that he had eaten but one meal during the week of his incarceration; that he was confined to a cell under constant guard; that he was being attended to by the prison psychiatrist and medical officer.

On July 19th, I phoned Dr. Bruckman, who is the psychiatrist at Sing Sing and spoke with him. He told me that Panico was schizophrenic; that he agreed with the diagnosis of Dr. Weiss; that he has recommended that Panico be transferred to Dannemora, which is the mental institution for the criminally insane

It is my sincere belief that the above facts are extremely relevant in the adjudication of the above appeal.

Very truly yours,

/s/ JEROME LEWIS

Distributed to Judge Moore
Friendly
Smith 7/20/62

Appendix D—Correspondence Re Petitioner's Mental Condition

JEROME LEWIS
ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, 1, N. Y.

TRIANGLE 5-1882

August 28, 1962

A. Daniel Fusaro
Clerk-U. S. Court of Appeals
Foley Square, New York

Re: U.S.A. v. Panico
Docket No. 27667

Dear Mr. Fusaro:

This is to supplement the letter that I forwarded to your office in which I advised you that two days after Salvatore Panico had been sentenced by Judge MacMahon, he was examined by the psychiatrist at Sing Sing Prison and was found to be schizophrenic.

Subsequent examinations by two state appointed psychiatrists confirmed this diagnosis and by order of the County Judge of Westchester County, Panico was committed to the Dannemora State Hospital.

The enclosed photostatic copies show that Panico was committed on August 22, 1962.

My sincerest thanks for your cooperation.

Very truly yours,

/s/ JEROME LEWIS

JL/JG
encls.
Distributed to LPM
8/29/62 HJF
JJS
EK

Appendix D—Correspondence Re Petitioner's Mental Condition

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
SING SING PRISON
OSSINNING, N. Y.

WILFRED L. DENNO
[SEAL]
WARDEN

August 13, 1962

Mr. Frank Panico
251 Bay 41st Street
Brooklyn, New York

RE: SALVATORE PANICO—#129-446

Dear Sir:

The above named inmate, your brother, having been certified by two physicians as being mentally ill, a petition will be made in Westchester County Court, Westchester County, White Plains, New York, on August 17, 1962, for his commitment to the Dannemora State Hospital, Dannemora, New York.

I am enclosing herewith copy of the Petition.

Very truly yours,

/s/ L. J. KELLY
Acting Warden

LJK:A:dp
Encl.

Appendix D—Correspondence Re Petitioner's Mental Condition

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DANNEMORA STATE HOSPITAL

[SEAL]
R. E. HEROLD, M. D.
ACTING SUPERINTENDENT

Dannemora, N. Y.
August 23, 1962

Mrs. Raffaela Panico
1474 86th Street
Brooklyn, New York

Re: SALVATORE PANICO #7171
D. C. I. #560624X

Dear Madam:

Your son, Salvatore Panico #7171 was admitted to this hospital because of mental illness on August 22, 1962. Though it is too early to evaluate the progress he will make, it is frequently necessary for patients to have special types of treatments to facilitate their recovery. One very useful type of treatment is Electric Shock Therapy, with which you may be familiar.

In order to avoid delay, should it be advisable to give this treatment to him, I am enclosing a permission blank for this treatment. If you will sign it in ink and have your signature witnessed by any person over 21 years of age, we can proceed with the treatment, if it should be necessary. Though there is a small element of danger in ad-

ministering the treatment, the benefits derived far outweigh this.

Please be assured of our earnest desire to do everything possible to hasten his recovery. I wish to thank you for your kind cooperation in this matter.

Very truly yours,

/s/ R. E. HEROLD
Acting Superintendent

REH:cc
Encls.

Appendix D—Correspondence Re Petitioner's Mental Condition

STATE OF NEW YORK
DEPARTMENT OF CORRECTION

SING SING PRISON
OSSINNING, N. Y.

WILFRED L. DENNO
[SEAL]
WARDEN

August 24, 1962

Mr. Jerome Lewis
Attorney at Law
66 Court Street
Brooklyn, New York

RE: SALVATORE PANICO—#129-446

Dear Sir:

This is to advise that the above named inmate, your client, was transferred to the Dannemora State Hospital, Dannemora, New York, on August 22, 1962.

Very truly yours,

/s/ L. J. KELLY
Acting Warden

LJK:A:dp